IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-796

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, et al.,

Petitioners

v.

CEDAR COAL COMPANY and SOUTHERN OHIO COAL COMPANY,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals For The Fourth Circuit

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INDEX

Cases Cited

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Petitioners, International Union, United Mine Workers of America; District 17, United Mine Workers of America; Local Union 1766, United Mine Workers of America; District 31, United Mine Workers of America; and Local Union 1949, United Mine Workers of America, respectfully pray that a writ of certiorari issued to review part of the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on July 6, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at 560 F.2d 1154 and is appended at App. A., pp. A-1 to A-42, infra. The District Courts for the Southern and Northern District of West Virginia did not render opinions.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 6, 1977. Petitioners' timely petition for rehearing was denied by order filed September 6, 1977, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the claim of coal operators that the honoring of a stranger picket line by coal miners is a breach of a judicially created implied no-strike duty, can be arbitrated when: (1) the grievance and arbitration machinery is not open to any coal operator grievances and (2) the collective bargaining agreement sued upon neither contains an express no strike duty nor mentions picket lines.

STATUTE INVOLVED

This case involves § 301(a) of the Labor Management Relations Act (LMRA), 61 Stat. 156, 29 U.S.C. 185(a), appended at App. B., p. B-1, infra.

STATEMENT OF THE CASE

1. Federal Jurisdiction

These cases arose when respondents Cedar Coal Company and Southern Ohio Coal Company ("coal operators")[1] invoked the jurisdiction of the District Courts

[1]The coal mines of respondent Cedar Coal Company are located in Kanawha County in the Southern District of West Virginia. Cedar filed case no. 76-0460 in the Southern District of West Virginia and case no. 76-1785 in the Court of Appeals. Hereinafter that case will at times be referred to as "the Cedar Coal case". Respondent Southern Ohio Coal Company operates mines in Marion County, West Virginia in the Northern District of West Virginia. Southern Ohio filed case no. 76-167-E in the Northern District of West Virginia and case no. 76-1846 in the Court of Appeals. Hereinafter at times that case will be referred to as the "Southern Ohio Coal case". Ohio Power Company is the parent of Southern Ohio and although petitioners do not believe it is a proper party to this case, it is named in accordance with recommended practice.

under § 301, LMRA, to secure injunctive relief and damages on account of work stoppages at their mines. The stoppages were alleged to have resulted from the refusal of miners employed by the coal operators to cross foreign picket lines set up by persons not employed at the mines.

2. The Parties

The petitioner United Mine Workers of America labor organizations ("the unions") represent for collective bargaining and other purposes the coal miners employed by the coal operators. The unions and the coal operators are parties to the National Bituminous Coal Wage Agreement of 1974.

3. Proceedings Below and Factual Background

In the summer of 1976 widespread picketing prompted by political protest[2] resulted in the closing of coal mines of the respondent coal operators. The single collective bargaining agreement in question does not contain a written no-strike agreement or any provision concerning picket lines. The coal operators alleged breach of the implied in law no strike clause and sought injunctions

[2]The picketing "developed into protests over real or imagined wrongs by the federal court" as found by then District Judge Hall in the Cedar Coal case. The facts and allegations of Cedar Coal case are stated in Part II of the opinion of the Court of Appeals, A-9 to A-11 infra, the facts of the Southern Ohio Coal case are stated at Part III of the same opinion, A-12 to A-14.

Another case involving Cedar Coal and Local Union 1759, United Mine Workers of America, United States District Court for the Southern District of West Virginia No. 76-0440, Court of Appeals No. 76-1793, is not the subject of this petition. For the record it should be noted that the petitioners have consistently taken clear exception to the characterization by the Court of Appeals of the facts of that case, as stated in Part I of the opinion of the Court of Appeals (A-3 to A-9). The District Court never made any reviewable determination as to the cause of the stoppage at Local 1759. The statements in Part I of the opinion of the Court of Appeals are not based on any findings of fact but are based upon affidavits which were presented, in most cases, initially to the Court of Appeals ostensibly for the purpose of ruling on the Rule 8, FRAP, motion for injunction pending appeal.

and damages. The District Court for the Southern District of West Virginia in the Cedar Coal case denied interlocutory relief and dismissed the complaint of Cedar Coal Company. The District Court for the Northern District of West Virginia denied the motion of Southern Ohio Coal for a preliminary injunction. Both coal operators appealed to the Court of Appeals for the Fourth Circuit.[3] The opinion was issued nearly eleven months after oral argument and was written by the only active Judge of the Court of Appeals on the panel.[4]

The Court of Appeals discussed principally the question of *Boys Markets*[5] injunctive relief. (A-31 to A-40) This petition does not concern the denial of injunctive relief. It is only concerned with the surprising and unexplained directive by the Court of Appeals that on remand of the cases the district courts, as a prelude to the damage claims, must "forthwith" direct arbitration of the central question of whether or not the refusal of the miners to cross the picket lines was a breach of contract. Item IX of the opinion, (A-40 to A-41). Petitioners sought rehearing primarily on the grounds that (i) the directive to remand was contrary to well established principles of federal labor law, discussed infra, and (ii) none of the coal operators expressly sought or argued in favor of a remand to arbitration without a *Boys Markets* injunction. After the petition for rehear-

[3]Although the operators' motions for immediate injunctive relief were denied, the appeals were accorded expedited treatment and oral argument was held within weeks after the cases were appealed.

[4]All but two active Judges of the Fourth Circuit disqualified themselves from the appeals. See footnote 1 of Order denying rehearing en banc filed by the Court of Appeals on September 6, 1977. The merits of the appeal were actually heard by one active Judge of that court, the Honorable Emory E. Widener, and by two Judges specially designated, the Honorable Pierce Lively, United States Circuit Judge for the Sixth Circuit and the Honorable John A. MacKenzie, United States District Judge for the Eastern District of Virginia.

[5]*Boys Markets* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970).

ing was denied, petitioners obtained a stay and initiated this proceeding.

REASON FOR GRANTING THE WRIT

I. The Decision Below Conflicts Directly With This Court's Holdings in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) and in *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976).

The contract sued upon does not contain a written no strike clause nor does it contain any promise concerning picket lines. The grievance and arbitration provisions of the contract are appended at App. C., pp. C-1 to C-8, infra. Accordingly, the coal operators' sole basis for seeking strike damages is breach of a no-strike clause implied from an agreement to arbitrate on the basis of the federal labor policies favoring arbitration by this Court in *Lucas Flour*.[6]

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), states the primary rule that it is the duty of *the courts* to determine "whether the reluctant party has breached his promise to arbitrate", because, "arbitration is a matter of contract and a party cannot be required to submit

[6]*Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). In *Lucas*, this Court held that a union, even in the absence of an express "no strike" agreement, could be liable for damages—but only in the limited situation of:

> . . . a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration . . .
>
> • • •
>
> What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory termination arbitration.

369 U.S. 105-6. This Court has consistently applied this confined formulation of the implied no strike duty. *Drake Bakeries* v. *Local 50, Bakery Workers*, 370 U.S. 254, 262 n. 8. (1962); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 248 n. 16 (1970); *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 381 and 384 (1974); and *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397, 407, 408 n. 10 (1976).

to arbitration any dispute which he has not agreed to so submit".[7] The Court of Appeals departed from this principle when it remanded to arbitration, rather than decide for itself, as required by *Atkinson,* the question of whether the *Lucas Flour* implied no-strike duty had been breached. Certiorari is sought primarily on the basis of that departure.

This departure from the rule of *Atkinson* is documented by the absence of any analysis by the Court of Appeals of the two secondary questions which must, according to *Atkinson,* be evaluated and answered by the Courts when deciding the primary question. The two secondary questions applied to this case are: (1) whether the "reluctant part[ies]", the unions, were bound to arbitrate the *employers'* claim and (2) whether the refusal to cross picket lines created an arbitrable issue. 370 U.S. at 241. The remand to arbitration was directed by the Court of Appeals without consideration of (i) those secondary questions or (ii) the primary question of whether the unions had breached any agreement to arbitrate.

[7]The full quotation is:

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined *by the court* on the basis of the contract entered into by the parties. 'The Congress has by § 301 of the Labor-Management Relations Act [29 U.S.C. 185], assigned *the Courts* the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). See also United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570-571 (1960) (concurring opinion).

Atkinson, supra, 370 U.S. at 241 (emphasis added).

A. Since the Union Did Not Agree to Arbitrate Claims of the Coal Operators, the Directive to Arbitrate Squarely Conflicts With This Court's Holding in *Atkinson* That a Union Should Not Be Required to Arbitrate Employer Claims in the Absence of an Agreement (Not Present Here) To Do So.

The reality of arbitration of only employee claims under the UMWA contract was restated succinctly by Southern Ohio's personnel manager. When asked if Southern Ohio "contemplated filing a grievance", he replied "[n]o, the company doesn't file grievances as you well know".[8]

Atkinson and all the decisions applying it examine the wording of the grievance and arbitration machinery in a labor agreement before deciding whether the party resisting arbitration should be required to submit a dispute to arbitration. Although the term "grievance" was broadly defined, this Court noted (i) the wording limiting the initiation and processing of grievances to the "individual employee" and (ii) the fact that it was only those individual employee grievances which were eligible for arbitration and concluded:

> There is not a word in the grievance and arbitration article providing for the submission of grievances by the company . . . At no place in the contract does the union agree to arbitrate at the behest of the company. The company is to take its claims elsewhere, which it has now done.

Atkinson, supra, 370 U.S. at 243. *Atkinson* held that

[8]Testimony of Forrest Skidmore in Southern Ohio Case (see footnote 1, supra), p. 35 of transcript of hearing of July 26, 1976. The Court of Appeals specifically recognized that Local 1949 did not refuse to arbitrate. ". . . [A]fter evidence was taken, plaintiffs' counsel conceded there had been no refusal [by the union] to arbitrate." A-13.

the strike damage question should be determined solely by the Courts.[9]

In this case, as the Court found in *Atkinson*, the arbitration agreement is not susceptible to a construction that the parties agreed to arbitrate employers claims for strike damages against the union. The grievance and arbitration procedure in the UMWA contract are "employee-oriented". The language of the procedure itself is limited to complaints of "the employee" who has the right to "make his complaint to his immediate foreman" at step 1. At step 2, the grievance is identified as "the Employee's grievance". (C-3)[9a] Steps 3 and 4 of the grievance procedure and arbitration at step 5 are limited to complaints which are processed at steps 1 and 2.[10] The total absence of any reference to employer grievances in the UMWA contract is also decisive. *Atkinson*, 370 U.S. at 243.[11]

[9]By contrast, in *Drake Bakeries* v. *Local 50, Bakery Workers*, 370 U.S. 254, 257-8 (1960), decided the same day as *Atkinson*, the grievance procedure stated that "either party" had the right to submit a matter to arbitration. The citation of *Drake* by the Court of Appeals and the omission of any reference to the companion *Atkinson* case (see p. A-41, infra) suggest that the Court of Appeals either thought (i) that the labor agreement in question provided for the processing of employer grievances or (ii) that the court did not correctly identify the proponent of the unexplained grievance.

[9a]Pursuant to *Atkinson*, 370 U.S. at 243, leading decisions of the Court of Appeals have recognized that, despite broad initial language of a grievance procedure, the scope of the grievance procedure is limited to complaints which can actually be processed under the language of the grievance procedure. *Friedrich* v. *Local 780, Electrical Workers*, 515 F.2d 225, 227-8 (5th Cir. 1975); *Bliss & Laughlin Industries* v. *Int. Assn. of Machinists*, 513 F.2d 987, 991-2 (7th Cir. 1955).

[10]The Courts of Appeals have also properly recognized that complaints which can be processed at the later steps of grievance and arbitration are only those which are processed at the earlier steps. *G. T. Schjeldahl Co.* v. *Lodge 1680 Machinists*, 393 F.2d 502, 505 (1st Cir. 1968); *Friedrich*, supra, note 9a, 515 F.2d at 229. Even though both parties to the UMWA contract can apply to an Arbitration Review Board, which exercises discretionary jurisdiction over arbitration decisions, each party is nevertheless applying for review of the "employees' grievance". See C-3 and *Vulcan-Cincinnati, Inc.* v. *Steelworkers*, 289 F.2d 103, 108 (6th Cir. 1961).

The *Steelworker's Trilogy*[12] "presumption of arbitrability" does not make any strike damages[13] claims in this

[11]The cases which order arbitration of strike damage questions uniformly do so because the *employer* can file a grievance. For example, *all* of the post *Steelworkers Trilogy* (1960) (see note 12, infra) decisions of the Courts of Appeals cited in the Annotation, "Matters Arbitrable Under Arbitration Provisions of Collective Labor Contract, § 13 Breach of Contract Generally, Damages", 24 ALR 2nd 752, as supplemented *Later Case Service* (July 1977 Supp.), which expressly rule on the proper forum for strike damage questions order arbitration of strike damage questions on the basis of a finding of a grievance procedure open to both employer and employee. *H. K. Porter Co.* v. *Steelworkers*, 400 F.2d 691, 29 ALR 3d 679 (4th Cir. 1968); *Yale & Towne Mfg. Co.* v. *International Ass'n Machinists*, 299 F.2d 882, 885 (3rd Cir. 1962) (E.D. Pa. 1961); *Jefferson City Cabinet Co.* v. *International Electrical Workers*, 313 F.2d 231, 233-4 (6th Cir. 1963); *Minnesota Joint Board, Clothing Workers* v. *United Garment Manufacturing Co.*, 338 F.2d 195, 198-9 (8th Cir. 1964); *Scalzitti Co.* v. *Operating Engineers Local 150*, 351 F.2d 576, 577 (7th Cir. 1965); *General Dynamics Corp.* v. *Industrial Union of Marine Workers*, 469 F.2d 848, 853-4 (1st Cir. 1972); *Howard Electric Co.* v. *Electrical Workers*, 423 F.2d 164, 167 (9th Cir. 1970). In *E. T. Simonds Construction Co.* v. *Hod Carriers*, 315 F.2d 291 (7th Cir. 1962), arbitration of strike damages was ordered because the union waived its right to a judicial stay of arbitration. *Valmac Industries* v. *Meatcutters*, 519 F.2d 263, 267-8 (8th Cir. 1975), cited at opinion, A-41, did not decide the question of the proper forum for the strike damage question. Neither party objected to the arbitration forum (by requesting a stay, etc.) nor to the arbitrability of the strike damage question. The employer essentially claimed that arbitration was unnecessary since it believed the district court had already decided the merits of breach of contract question. The court held that arbitration was still essential. Also, the arbitrability ruling in *Valmac* was in effect reversed by this Court in *Food Handlers Local 425* v. *Valmac Ind. Inc.*, 428 U.S. 910 (1976).

By contrast, *all* of the similar circuit decisions in the same annotation hold the strike damage claims are properly before a court when the grievance procedures are "employee-oriented". *Affiliated Food Distributors, Inc.* v. *Local 229, Teamsters*, 483 F.2d 418, 420-1 (3rd Cir. 1973), cert. denied 415 U.S. 916; *Bliss & Laughlin Industries* v. *International Association of Machinists*, 513 F.2d 987, 990 (7th Cir. 1975); *Los Angeles Paper Bag Co.* v. *Printers District Council 2*, 345 F.2d 759 (9th Cir. 1965); *G. T. Schjeldahl Co.* v. *Lodge 1680 Machinists*, 393 F.2d 502, 505 (1st Cir. 1968); *Vulcan-Cincinnati Inc.* v. *Steelworkers*, 289 F.2d 103 (6th Cir. 1961); *Friedrich* v. *Local 780, IUE*, 515 F.2d 225, 230 (5th Cir. 1975).

[12]*Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

[13]As used hereinafter, the term "strike damages" refers to all issues arising from a claim by an employer against the union for a strike. These issues include breach of contract, the question the Court of Appeals remanded to arbitration, and issues such as union responsibility or the amount of damages which are not the subject of the remand order.

case arbitrable, because there is no "doubt", to which the presumption might apply, that the coal operators can not file grievances.[14] Therefore, the conclusion this Court reached in *Atkinson*, immediately after citing the *Steelworkers Trilogy*, applies herein as well. *Atkinson* concluded that the contract was:

> . . . not susceptible to a construction that the . . . [reluctant party] was bound to arbitrate [a] claim for damages . . . for breach of the undertaking not to strike.

370 U.S. at 241. Since, as documented above and proclaimed by Southern Ohio's personnel manager, "the company doesn't file grievances", the directive of the Fourth Circuit to arbitrate the employer's claims conflicts squarely with *Atkinson*.

B. The Directive to Arbitrate the Question of Breach of an Implied No Strike Clause Directly Conflicts With the Holding of This Court in *Buffalo Forge* That an Implied No Strike Clause Provides "No Possible Basis for Implying From the Existence of an Arbitration Clause a Promise Not to Strike . . .". 428 U.S. at 408.

Buffalo Forge conclusively establishes the non-arbitrability of any claim of breach of an implied no strike clause. Keeping in mind that the contracts in *Buffalo Forge* contained an express no-strike clause, this Court stated:

> Thus, had the contract not contained a *no-strike*

[14]The Courts of Appeals have likewise ruled that the presumption of arbitrability does not apply to make employer claims for strike damages arbitrable when collective bargaining agreements do not provide for the processing of employer grievances. *Affiliated Food Distributors, Inc.* v. *Local 229, Teamsters*, 483 F.2d 418, 420 (3rd Cir. 1973); *Bliss & Laughlin Industries*, supra, note 11, 513 F.2d 989-90; *Friedrich*, supra, n. 11, 515 F.2d at 229.

> *clause*[15] . . ., there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike which could have been violated by the sympathy strike in this case. *Gateway Coal Co.* v. *Mine Workers*, [414 U.S. 368] 382 (1974)].

428 U.S. at 408 text at n. 10. Footnote 10 of *Buffalo Forge*, not mentioned in the opinion of the Court of Appeals, held that Courts of Appeals with similar UMWA contracts before them were "wrong" "to the extent" they assumed "a mandatory arbitration clause *implies* a commitment not to engage in sympathy strikes . . ." (emphasis added).[16] The dissent in *Buffalo Forge* specifically referred to the above text and, after citing footnote 10, agreed: "in particular, an implied no-strike clause does not extend to sympathy strikes". 428 U.S. at 425 n. 17."[17]

[15]Underscoring added. Although the underscored portion of *Buffalo Forge* did not say "express no-strike clause", that portion of the opinion could only mean an express no-strike clause. All of the circuit cases cited in the text of footnote 10 (428 U.S. at 408) involve contracts with *implied* no-strike clauses. The purpose of footnote 10 apparently is to explain why the stoppage in *Buffalo Forge* could not be enjoined under the authority of either *Gateway Coal Co.* v. *UMWA*, 414 U.S. 368 (1974) or *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). The Court pointed out that *Lucas* and *Gateway* concerned the implied no-strike duty. It should be kept in mind that the arbitrability of the picket line question was conceded by the unions in *Buffalo Forge*. Petitioners have steadfastly maintained that the stoppages herein were not over arbitrable matters. Although the Court of Appeals does refer to footnote 9 of *Buffalo Forge*, companion to footnote 10, it did not refer to footnote 10. A-33, A-35, A-40.

[16]Petitioners were unable to locate any precedent awarding damages for a sympathy strike on the basis of breach of an implied *Lucas Flour* no-strike clause. Both of the labor agreements before this Court in *Atkinson* and *Drake Bakeries* contained express no-strike agreements. *Drake*, supra, 370 U.S. at 259, n. 4; *Atkinson*, supra, 370 U.S. at 241, n. 1. All cases cited at note 11, supra, involved strike damage liability claims based on express no-strike clauses. None of the decisions involved implied no-strike clauses.

[17]Indeed, as is shown in Part II hereof, the Third Circuit has directly ruled that the refusal to cross picket lines does not under the UMWA contract give rise to a damage action for breach of the implied no-strike clause and the Sixth Circuit has made the same ruling in principle. *U. S. Steel Corp.* v. *UMWA*, 548 F.2d 67, 73 (1976) cert. denied, 45 USLW 2318 (June 13, 1977); *Southern Ohio Coal Co.* v. *UMWA*, 551 F.2d 695, 704 (6th Cir. 1977), cert denied, 46 USLW 3219, October 4, 1977 (No. 76-1565).

In addition to the impossibility of directing arbitration of claims which are themselves not arbitrable, the order of the Court of Appeals to arbitrate on remand forces the parties to arbitrate a public right in a private forum. In the absence of an agreement to the contrary, not present on this record, arbitration, is reserved for private right questions.

Any duty to cross picket lines (which is denied) would only originate from the *Lucas Flour* implied no-strike clause, discussed at note 6, supra. That duty exists solely by operation of law from federal labor statutes, §§ 203 (d) and 301 of Taft-Hartley, 29 U.S.C. 173 (d) and 185, and in particular on policies created under § 301[19] by this Court. It has no basis in bargaining history, contractual language or prior practice. Hence, there is no arbitral subject matter upon which an umpire could possibly determine the nature of the alleged duty.

> The specialized confidence of arbitrators pertains primarily to the law of the shop, not to *the law of the land* . . . [T]he *resolution of statutory . . . issues is a primary responsibility of the courts* . . .

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (emphasis added).[20]

In sum, the remand order of the Court of Appeals

[19] *Textile Workers* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957), found § 301 to be authority for the federal courts to fashion and apply *federal substantive law* from the policy of the national labor laws. Not only *Lucas Flour*, and *Gateway Coal*, supra note 6, but also, the *Steelworkers Trilogy*, supra note 12, *Drake* and *Atkinson*, supra note 9, and *Boys Markets*, supra note 5, are federal substantive law created thereunder.

[20] Notwithstanding the central role of labor arbitration, the Court recognized that the "arbitrable processes [are] comparatively inferior to the judicial processes . . .". *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). *Gardner* also stressed the limited judicial review of arbitration decisions. 415 U.S. at 34. Arbitration decisions are not reviewable on the merits but only subject to successful judicial review when they are arbitrary, fraudulent or without authority.

conflicts with *Atkinson*, supra, because it directs arbitration by a *party* who did not agree to arbitrate. The directive also conflicts with the square holding of *Buffalo Forge* that the *claim* is not arbitrable. Certiorari should, therefore, be granted because the Court of Appeals has directed arbitration contrary to these fundamental rulings that arbitration should be ordered only when the reluctant party agreed to arbitrate and, then, only as to claims which both parties agreed to arbitrate.

II. The Decision Below Presents an Important Statutory Question on Which the Courts of Appeal are in Direct Conflict.

In the Cedar Coal case the action of the district court in dismissing the complaint, including the coal operator's damage claim, was found to have been an error by the Court of Appeals. The Court of Appeals "*assumed* the arbitrability of the question of whether or not [the Cedar Coal local] might be required to cross . . ." the picket lines. Part VIII (d) of opinion, A-39 (emphasis added). That assumption, coupled with the directive to arbitrate, amounts to a ruling that the coal operator claiming a sympathy strike has a cause of action for breach of the *Lucas Flour* implied no strike clause—at least pending a judicially directed determination of arbitrability, and hence actionability, by the arbitrator. The holding conflicts squarely with a decision of the Third Circuit, under a substantially identical UMWA contract,[21] that the refusal to cross picket lines does not give rise to a damage action for breach of the implied

[21] *U.S. Steel* involved the 1968 UMWA agreement. The scope of the arbitration clause language is quoted by the Third Circuit, 548 F.2d at 70, and is identical for all relevant purposes to the language in the contract before this court. See C-3 to C-5.

no-strike clause. *U. S. Steel* v. *UMWA*, 548 F.2d 67, 73 (1976), cert. denied 45 USLW 2318 (June 13, 1977)."

The ruling of the Fourth Circuit also conflicts in principle with a recent ruling of the Sixth Circuit upholding the denial of injunctive relief for a sympathy strike. The crux of the Sixth Circuit's decision was that the stranger picket line question was not "arbitrable" and hence not enjoinable. *Southern Ohio Coal Co.* v. *UMWA*, 551 F.2d at 703, 715 (6th Cir., February 11, 1977), cert. denied 46 USLW 3219 (October 4, 1977)." This conflict is particularly compelling and needful of resolution because it involves the same stoppage, some of the same parties[24] and the same contract as the decision of the Fourth Circuit.

The holdings of the Third and Sixth Circuits, which were decided well before the decision of the Fourth Cir-

[22]The Third Circuit held:

> Had the contract in the instant case contained a no-strike clause, the issue whether the sympathy strike violated the union's no-strike undertaking might have been arbitrable. In the absence of the no-strike clause, however, *Buffalo Forge* establishes that there is "no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike" in this case. . . . Quite simply, the work stoppage at the U. S. Steel mine presented no arbitrable issue.

548 F.2d at 73.

[23]The Sixth Circuit held:

> *Buffalo Forge* also requires us to reject the Company's contention that the arbitration clause in the collective bargaining agreement is broad enough to encompass the issue of whether the union had contracted away the employees' right to honor picket lines. . . . The Bituminous Coal Wage Agreement of 1974 does not contain an express no-strike clause so the issue of the union's right to refuse to cross a picket line is not even arguably arbitrable. . . . [T]he unions' refusal to cross the stranger picket line did not involve an arbitrable dispute . . ."

551 F.2d at 704. Although the determination of non-arbitrability was made as to the issue of *enjoinability*, it also means that the work stoppage caused by pickets is not *actionable* under *Lucas Flour* as the strike would not be over an arbitrable matter. See note 6, supra.

[24]The International Union, United Mine Workers of America and coal operator, Southern Ohio Coal Company are parties in both cases.

cuit of July 1977,[25] are expressly based on this Court's ruling in *Buffalo Forge*. Since all of these holdings attempt to apply the federal labor policies derived from § 301 of LMRA the decision of the Fourth Circuit presents an important statutory question on which the Courts of Appeals are in direct conflict.

III. The Conflicts of the Decision of the Court of Appeals for the Fourth Circuit with Decisions of This Court and With Decisions of Other Courts of Appeals Creates a Substantial and Serious Hindrance to the Effective Administration of Justice.

This petition seeks review of only one of many errors[26] committed by the Court of Appeals.[27] The directive to arbitrate the *Lucas Flour* question, if allowed to stand is an anomaly (see parts I and II, supra) in an actively litigated area of federal labor law. Work stoppages resulting from picketing in the coal industry are a matter of numerous damage claims pending within the jurisdiction of the Fourth Circuit and other circuits.[28] For example, the nearly 100 picketing cases [29] pending in the District Courts of West Virginia would, if they were in the Third or Sixth Circuits, be the subject of dispositive motions.

The opinion of the Court of Appeals requires remand

[25]Both decisions were heavily relied upon by petitioners in briefs presented to the Court of Appeals after argument and before rehearing was denied.

[26]Petitioners believe that all of the rulings of the Court of Appeals in the companion case involving Local Union 1759 (A-16, A-31, and A-37) as well as the rulings concerning appellate jurisdiction (A-15) and enjoinability (A-39) at the Cedar/Local 1766 mines are in error.

[27]Certiorari is not sought on those issues due to a variety of factors: (i) the contract sued upon has expired, (ii) the unusual circumstances which apparently caused the stoppages are unlikely to ever recur, (iii) the state of the record, and (iv) the circumstance that these errors can be raised, consistent with judicial economy and probably without undue hardship on petitioners, at the time of final judgment.

[28]In addition to the Fourth, Third and Sixth Circuits, similar litigation is pending in the Seventh Circuit.

[29]See Appendix D, pp. D-1 - D-3, and footnote 30, infra.

of these cases to the uncertainties of arbitration for determination of the *Lucas Flour* question. District Courts in the Fourth Circuit now faced with coal operator requests for remands to arbitration[30] may be required by the decision of the Fourth Circuit to direct, erroneously, remands to arbitration even though federal courts in the neighboring Sixth and Third Circuits would dismiss the lawsuits. Since the unmistakable error will inevitably pervade and infect this multitude of cases, it must be corrected sooner or later.

In addition to burdening the judiciary, erroneous remands to arbitration will overload the arbitration process, which is, after all, the forum which every case cited herein is attempting to promote. Arbitration is ill equipped and ill suited, especially in the coal industry, to process strike damage claims, which can amount, as is shown above at note 30, to multi-million dollar claims. The uncertainty created by the fundamental and clear cut error of federal labor law committed by the Fourth Circuit can only be, and should be, removed by this Court in the interest of the prompt and economic termination of these two and a multitude of similar cases.

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[30]One case now pending before the Fourth Circuit, set for oral argument on December 7, 1977, involves verdicts for work stoppages caused by picketing in excess of $458,000. *UMWA et al.* v. *Carbon Fuel*, No. 77-1422. The brief of the coal operator, Carbon Fuel Company, specifically seeks a remand to arbitration of the above noted stoppages and "[u]pon receipt of the arbitrator's opinion, the district court can then either reinstate or vacate its judgments [of more than $485,000] as to the strikes involved." Brief filed on or about August 4, 1977 at p. 13. In another claim, this one for 2.5 million dollars in damages, substantially identical to *Carbon Fuel*, now pending on summary judgment before the Southern District of West Virginia, the operator has requested remand to arbitration identical to that sought in the *Carbon Fuel* case. *Youngstown Mines Corporation* v. *UMWA, et al.*, U.S.D.C., S.D. W. Va. Civil No. 75-0256 CH, Motion for Partial Summary Judgment and Order to Arbitrate filed, on or about October 10, 1977, p. 5.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1785

CEDAR COAL COMPANY,
a Corporation

v. *Appellant*

UNITED MINE WORKERS OF AMERICA; et al.

Appellees

BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC.

Amicus Curiae

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON. K. K. HALL, DISTRICT JUDGE.

No. 76-1793 (also Misc. No. 76-8239)

CEDAR COAL COMPANY,
a Corporation

v. *Appellant*

UNITED MINE WORKERS OF AMERICA; et al.

Appellees

BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC.

Amicus Curiae

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON. DENNIS R. KNAPP, DISTRICT JUDGE.

No. 76-1846

SOUTHERN OHIO COAL COMPANY,
a Corporation, and OHIO
POWER COMPANY, a Corporation

Appellants

v.

UNITED MINE WORKERS OF AMERICA, et al.

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT ELKINS.
ROBERT E. MAXWELL, DISTRICT JUDGE.

Argued August 10, 1976 Decided July 6, 1977.

Before WIDENER, Circuit Judge, LIVELY, Circuit Judge,* and MacKENZIE, District Judge.**

WIDENER, Circuit Judge:

This appeal is a consolidation of three related cases. In all three, plaintiff coal companies sought damages and injunctive relief in the federal district courts against striking union locals. Relief was denied for various

*United States Circuit Judge for the Sixth Circuit, sitting by designation.

**United States District Judge for the Eastern District of Virginia, sitting by designation.

reasons and by various procedures. In each case the appellant is the coal company.

The facts of each case will first be discussed separately.

I

Case No. 76-1793 involves Cedar Coal Company (Cedar) and the United Mine Workers of America, Local Union No. 1759 (Local 1759). Cedar is a West Virginia Corporation engaged in the production, preparation, and shipment of bituminous coal. Local 1759 is a local union which represents the employees who work at five mines owned by Cedar: Grace No. 3, Ridgeroad No. 5, Coal Fork Nos. 1 and 2, and Slaughter's Creek No. 1. Cedar and Local 1759 are signatories to the National Bituminous Coal Wage Agreement of 1974 which contains specific arbitration procedures, and, in Article XXVII, the following clause:

ARTICLE XXVII—MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS

> The United Mine Workers of America and the employers agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract

and by collective bargaining without recourse to the courts.

Prior to June 1976, a dispute arose at Grace No. 3 mine over the meaning of Subparagraph III, (a) (7) of the 1974 Agreement:

> "The Employer shall station a responsible employee on the surface to communicate at all times with the employees when they are at work underground."

The dispute was whether this provision required this job, the "responsible employee," be given to a member of the bargaining unit, and if so, whether the company was required to create a new bargaining unit job to be posted for job bidding under the collective bargaining agreement or whether the duty could be assigned as an additional duty to an employee holding an existing bargaining unit job. The parties submitted the dispute over the meaning of subparagraph (7) to arbitration. On June 3, 1976, the arbitrator decided the contract required Cedar to assign the job to a bargaining unit member, a decision vindicating the Union's position.

But perhaps because the arbitrator misunderstood the full scope of the dispute, he did not decide whether the provision required Cedar to create a new job and to post it for bidding by bargaining unit members. The dispute continued over this undecided issue and on June 22 employees at Grace No. 3 mine went on strike in support of their continuing demand that the company create and post a new job for bidding.

The District and Local Unions filed suit in the United States District Court on June 23, seeking injunctive relief to enforce the arbitrator's decision as they interpreted it, that is, as requiring a new job classification

and posting. The hearing on the TRO-preliminary injunction against Cedar was scheduled for June 23, but because of a continuing jury trial, the district judge rescheduled the hearing for the following morning. The employees of Grace No. 3 returned to work on June 23, but apparently dissatisfied with the postponement of their case in the district court, the Union continued striking the following morning, June 24, when employees at all of Cedar's mines, whose employees were members of Local 1759, struck, and Local 1759 decided not to pursue further its request for injunctive relief in the courts although a hearing had been set. The record in that case discloses that it is still pending.

On June 24, Cedar suspended, subject to discharge, two employees of Grace No. 3 mine who allegedly instigated and encouraged the strike by picketing. The employees filed a grievance over the suspensions and the parties submitted the matter to arbitration. The arbitrator, on July 1, upheld the suspension of the two Grace No. 3 mine employees for two weeks without pay, but rejected their discharge as too severe. A protest over the suspension of these employees and a demand that the suspension be rescinded became additional reasons for the strike, which continued unabated.

Between June 26 and July 10, the strike was interrupted by the miners' regularly scheduled vacation. During this time, the arbitrator rendered a written decision on the posting issue which had been decided and delivered orally July 1. On July 9, he announced in writing that Cedar could assign the communications task to a bargaining unit member as an ancillary duty and did not have to post a new job for bidding by bargaining unit members.

On July 12, the first work day after vacation, Grace No. 3 and Coal Fork mines did not return to work, resuming the strike. The Coal Fork mines returned to work on July 13, but all Cedar employees (including those at the Coal Fork mines) represented by Local 1759 (and by Local 1766) resumed the strike on July 14 and remained continuously on strike to the time this appeal was heard.

On July 12, Cedar filed suit for injunctive relief and damages under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185. Cedar alleged that the unions and employees followed a "pattern and practice of refusing to submit . . . disputes . . . to peaceful settlement through grievance and arbitration procedures," that this pattern would continue, and that the present strike was over the arbitrator's rulings both as to the discharged employees and as to the job posting of the communication job. At the same time, Cedar moved for a preliminary injunction and a temporary restraining order. The TRO issued on July 13, to expire ten days later, and the hearing on the preliminary injunction was set for July 21. The employees protested the company's action in obtaining the restraining order and disputed the company's right to resort to the courts to enforce the arbitrator's decisions and the arbitration and implied no-strike provisions of the collective bargaining agreement. They indicated to Cedar's personnel manager that these actions were additional reasons for striking at all of the company's mines.

Although copies of the TRO were posted and served upon the employees, the strike continued and spread to other mines. At a hearing on civil contempt before the district court on July 16, two individual employee defendants were found guilty of contempt and fined $50

each. The judge imposed on the union a $25,000 per day coercive civil contempt fine and a $50,000 compensatory fine.

On July 20, Local 1759 filed a motion to vacate the TRO, emphasizing the three points to its position:

1. It argued the dispute was not arbitrable under *Buffalo Force Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), because the strike, it said, since at least July 18, was to protest federal labor injunctions and was in response to pickets from other locals who prevented employees from returning to work by "asking 'all UMWA miners to strike to stop the injunctions.'" Therefore, it argued the district court lacked jurisdiction for an injunction under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15.

2. It argued that because of threats of violence and the likelihood of personal injury created by an abnormally dangerous condition at the mine, the employees' refusal to return to work was not a strike under section 502 of the Labor Management Relations Act, 29 U.S.C. § 143, and therefore not enjoinable under 29 U.S.C. § 185.

3. Because the strike was not authorized by the defendant labor unions, it was a "wildcat" strike, and the unions could not be held responsible for it.

On July 22, Cedar suspended another three members of Local 1759 for picketing their own operations. According to an affidavit by Cedar's personnel manager, those discharges have since been an additional cause of the strike. The grievances filed in response to those suspensions are now pending before the arbitrator.

July 22 was also the day scheduled for the hearing

on Cedar's preliminary injunction. But the attorneys for both parties were not available because of court appearances related to other litigation over the strike. The district judge therefore continued the hearing to July 27, and extended the TRO until that day. But on July 23 the judge continued the hearing indefinitely without stating any reasons. On that day, according to an affidavit of the personnel manager of Cedar, Hayes Holstein, the President of Local 1759 called him to say that at a Local meeting, 1759 decided to continue striking until four additional demands were met. These demands were:

1. That the UMWA receive justice equal with that given coal companies in the federal courts.

2. That the judges of the United States District Court for the Southern District of West Virginia be investigated to see whether they have been improperly influenced to side with coal operators against the UMWA.

3. That Cedar Coal Company dismiss and abandon all of its cases in federal courts, including all contempt actions, and further abandon and withdraw all contractual disciplinary action taken against any members of Local 1759, and

4. That all coal operators including Cedar pledge not to take any further legal or contractual actions against members of the UMWA for their actions relating to the strike.

Cedar applied for an injunction pending appeal under Rule 62 FRCP. The district court denied the motion, saying:

> ". . . [A]lthough plaintiff may be entitled to such on the basis of the allegations in the verified complaint and the affidavit attached to the motion, such an injunction would not serve to end the strike; but would be unenforceable, and might aggravate and prolong the strike by further antagonizing the miners engaged in the strike."

Cedar then applied for an injunction pending appeal to the writer of this opinion, acting as a single judge under FRAP 8 "in an exceptional case where reference to a panel would be impracticable due to the requirements of time", who granted an injunction ordering Local 1759 to refrain from striking over any dispute concerning the arbitrator's decisions relating to the outside communication job or the discharge of the two employees.

Cedar now appeals the district court's continuance indefinitely of the hearing for a preliminary injunction, under 28 U.S.C. § 1292(a) (1).

II

Case No. 76-1785 concerns another local union of the United Mine Workers of America within District 17, Local 1766, whose members are employees of Cedar Coal Company and are signatory to the National Bituminous Coal Wage Agreement of 1974. Members of Local 1766 work at Cedar's Denny Surface and Grace No. 2 mines.

On June 24 and 25, members of Local 1766 encountered pickets at the mouth of Slaughter's Creek Hollow, the main entrance to mines under the jurisdiction of Local 1766. Local 1766 employees did not cross the picket lines and did not report to work on those days. According to the Union, the pickets told members of Local 1766 that they were striking in protest of federal court in-

junctions in labor disputes. It is admitted that these initial pickets were from Local 1759.

After the regular annual vacation from June 26 to July 10, members of Local 1766 returned to work for two days. On July 14, pickets again appeared at the beginning of the work shifts. Local 1766 members did not report for work that day and have remained out up to the time of the argument of this case.

On July 20, Cedar filed suit against Local 1766, and the district and international unions, under 29 U.S.C. § 185. The complaint included allegations that the miners had for a long time followed a pattern and practice of refusing to submit arbitrable disputes to peaceful settlement through the arbitration procedures, and of engaging repeatedly in work stoppages instead. It also alleged a pattern and practice of the defendants to treat arbitrable disputes arising at any mine of any signatory operator as their own, as disputes between all employees and all signatory operators, and as directly involving the terms and conditions of employment of all employees at all mines. This strike, the complaint alleged, was over the arbitrator's rulings in the disputes of Local 1759.

Although a district judge of the court, as before recited, had entered a TRO restraining Local 1759 "and all persons acting in concert and participation with it, from continuing to engage in the strike," Local 1766 did not return to work. As a result, all of Cedar's mines served by Locals 1759 and 1766 were shut down and rendered idle.

Filed with Cedar's complaint against Local 1766 was a motion for a TRO. On July 20, the district judge denied the motion, giving three reasons:

1. Since the dispute originally arose between Cedar and Local 1759, it was not 1766's dispute even though they might profit from its resolution. As far as 1766 was concerned, it was, instead, a sympathy strike.

2. "I understand from Buffalo Forge, when they said that the *Armco* case was plainly wrong, or whatever the words were, it was my understanding that that meant that whether or not to cross a picket line was not an arbitrable issue and therefore they couldn't be compelled to cross a picket line," and

3. Whatever its original cause, the strike developed into protest over real or imagined wrongs by the federal courts.

After the court announced that it intended to rule against Cedar on the motion for a TRO, counsel for Local 1766 moved the court to dismiss the complaint for failure to state a claim upon which relief could be granted. The court granted the motion and dismissed the complaint, not just as against Local 1766 but as against all defendants.

Cedar immediately moved for an injunction pending appeal, which was denied, and then applied to the writer again, sitting as a single judge under FRAP 8, who denied the application, saying the outcome of the appeal in view of the recent Supreme Court case of *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), was not certain enough to warrant an injunction pending appeal.

Cedar, in case No. 76-1785, appeals the dismissal of its complaint for failure to state a claim upon which relief could be granted.

III

Case No. 76-1846 involves employees of Southern Ohio Coal Company (Southern), a coal mining corporation in Marion County, West Virginia. Local 1949 is the labor organization representing Southern's production and maintenance employees working at the Martinka Mine. Southern is a signatory to the National Bituminous Coal Wage Agreement of 1974 with the UMWA, of which defendants District 31 and Local 1949 are members.

A work stoppage at the Martinka mine began at 12:01 a.m., Monday, July 26, when employees met, at the access road to the mine, twelve to fifteen pickets who were passing out handbills reading as follows:

> "UMWA STRIKE AGAINST INJUNCTIONS
> "UMWA LOCAL UNION 1759, CEDAR COAL COMPANY HAS A FEDERAL INJUNCTION AGAINST THEM. THEY ARE BEING FINED $50,000 and $25,000 A DAY FOR STRIKING.
>
> "WE ARE SICK AND TIRED OF THE FEDERAL COURTS TAKING THE SIDE OF THE COAL OPERATORS. HUNDREDS OF LOCALS ALL THROUGHOUT THE COAL FIELDS KNOW HOW UNJUST THE USE OF FEDERAL INJUNCTIONS ARE.
>
> "ALL UMWA MINERS ARE ASKED TO STRIKE TO STOP THE INJUNCTIONS AND TO END ALL FINES AND SENTENCES.
>
> "Paid by UMWA members, Combined Miners,
>
> Robert Nelson, Chairman"

Some of these pickets were drinking and some appeared to be drunk. The district court found the pickets were not members of Local 1949, but were UMWA

members. In its oral opinion the court stated that the Southern employees "perhaps from fear or perhaps from exercise of a right not to cross picket lines, or perhaps for other reasons, respectful of the picket line and its meaning to them,. . . did not cross it either at the midnight shift or at the 8:00 a.m. [shift]." It went on to find that the resulting work stoppage was "one of failure to cross a picket line maintained by others than the members of this particular local union."

On July 26, Southern filed suit against District 31 and Local 1949 in the district court under 29 U.S.C. § 185, asking for damages and injunctive relief. The complaint alleged that the work stoppage was the result of refusal to cross a picket line, and took the position that this was a dispute resolvable under the arbitration provisions of Article XXIII of the collective bargaining agreement. The complaint further alleged that defendants refused to submit the matter to arbitration, and that they "engaged in a willful and deliberate pattern of refusing and avoiding compliance with the arbitration and grievance procedures," resorting instead to work stoppages, a conclusion based on fifteen other work stoppages by this local and district under the 1974 contract. There was nothing to indicate, the complaint continued, that such past pattern would not continue. But, after evidence was taken, plaintiffs' counsel conceded that there had been no refusal to arbitrate. Just as importantly, although given the opportunity, the union did not agree to arbitrate without concurrently striking, although arbitration was demanded.

Motions for a preliminary injunction and TRO accompanied the complaint. At a hearing on both,[1] the district

[1]The district judge adopted a commendable procedure. He heard both motions together and heard oral evidence.

court took testimony and then denied the motions, relying on *Buffalo Forge* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976). Southern then appealed from the denial of injunctive relief and applied for an injunction pending appeal. As with Locals 1759 and 1766, Local 1949 had remained on strike until the argument of those cases with this one.

After the case was argued on the issue of an injunction pending appeal, we inquired of the parties if the issue of the denial of a preliminary injunction should be decided now, rather than deferring the matter, and they graciously agreed and filed additional authorities, all recognizing that that issue had to follow regardless of the outcome of a ruling on the injunction pending appeal.

IV

We may not close our eyes to the fact freely argued by the parties that the strike which commenced with the grievance of Local 1759 spread to affect at least a substantial part of the bituminous coal industry. It has since ceased and we have received additional briefs on mootness.

V

In case No. 76-1785 concerning Local No. 1766, et al, the unions take the position that the order dismissing the complaint is not an appealable order under 28 USC § 1291.

> The full text of the order is as follows:
>
> "On motion of the defendants under Rule 12(b)(6) of the Federal Rules of Civil Procedure, it is hereby ordered that plaintiff's complaint be, and it hereby is, dismissed with prejudice for failure to state a claim upon which relief can be granted. "Enter: This 20 day of July, 1976."

The gist of the unions' argument is that, because the order dismisses the complaint, rather than adjudicates, and might leave room open for later amendment, it is not an appealable order within the contemplation of § 1291. We do not agree. Not only does the transcript indicate that the order was intended to be in all respects final, we think an order dismissing a complaint with prejudice for failure to state a claim upon which relief can be granted, with no mention of amendment, and no attempt at amendment shown in the record, is a final appealable order under § 1291.

VI

In case No. 76-1793 concerning Local No. 1759, et al, the unions contend that the indefinite continuance of the motion for a preliminary injunction is not a denial of injunctive relief and thus is not an appealable order under 28 USC § 1292(a)(1).

It must be remembered that the temporary restraining order issued by the court was to expire on July 23rd and that the hearing on the preliminary injunction had been set for July 22nd but was not heard on motion of the unions because the attorneys for both sides were not available due to court appearances related to other litigation concerning the strike. On that account, the court had continued the hearing on the preliminary injunction to July 27th and had extended the TRO until the 27th. But on July 23rd the judge continued the hearing on the preliminary injunction indefinitely, that is to say "until the further order of . . . [the] court," stating no reason, and the matter has never been heard, although it was bound to have been brought to his attention by the application for an injunction pending appeal which was asked for in that court. So the failure to hear the

motion for the preliminary injunction cannot be taken as inadvertence; rather, it may only be construed as a conscious denial of a hearing on the motion for a preliminary injunction and a similarly conscious allowing of the expiration of the TRO.

We hasten to add that by use of the word "conscious," we attribute no improper motive to the district judge, rather using the word to distinguish between acts which are voluntary on the one hand and inadvertent on the other.

We think the indefinite continuance amounted to the refusing of an injunction and is appealable as such under 28 USC § 1292(a). In indistinguishable circumstances, the Fifth Circuit has held such action appealable in *United States* v. *Lynd*, 301 F2d 318 (5th Cir. 1962), and noted the holding with approval in *Kennedy* v. *Lynd*, 306 F2d 222, 229, n. 3 (5th Cir. 1962). See also *McCoy* v. *Louisiana, etc.*, 332 F2d 915 (5th Cir. 1964). We follow those precedents. See also Wright and Miller, *Federal Practice and Procedure*, Vol. 11, § 2962. Were an appeal not allowed under the facts as they are presented to us in this case, it would permit a plain denial of even the bare consideration of whether to consider injunctive relief to go unaccounted for by virtue of an indefinite continuance. We are aware, of course, that the mere expiration of the TRO gives no ground for appeal. See Wright and Miller, supra.

Since we treat the district court's action as the refusal of a preliminary injunction, the question before us is whether the refusal was an abuse of discretion.

VII

The next defense the unions assert to these cases is that they are moot so far as the injunctive aspects of

them are concerned. It is not contended that the damages question in case No. 76-1785 (Local 1766) is moot.

Their principal argument is that the mootness issue is controlled by *Oil Workers Local 8-6* v. *Missouri*, 361 U.S. 363 (1960), which followed *Harris* v. *Battle*, 348 U.S. 803 (1954).

In our case, the strike ended after the argument of the case and the day before a hearing for Local 1759 on a civil contempt citation before this court.

We think the cases are not moot, it being remembered that the questions before us in No. 76-1793 (Local 1759) and No. 76-1846 (Local 1949) are the denials of preliminary injunctions, while the question before us in No. 76-1785 (Local 1766) is the denial of any relief, temporary restraining order, preliminary or permanent injunction, or damages.

We begin with the proposition that mootness is a jurisdictional question going to the existence of a case or controversy under Article III of the Constitution. The rule is stated in *North Carolina* v. *Rice*, 404 U.S. 244 (1971), that courts are not empowered to decide moot questions or abstract propositions, but the exercise of judicial power depends upon the existence of a case or controversy. The suit must be definite and concrete, touching the legal relations of parties having adverse legal interests and be a real and substantial controversy admitting of specific relief through a decree of conclusive character as distinguished from an opinion of what the law would be upon a hypothetical statement of facts.

Neither side would take exception, we think, to the just stated proposition. The unions, however, claim that under *Oil Workers* these cases are required to be moot

because the strike has ended. In that case, the State of Missouri seized, under a Missouri statute, a public utility which had been the subject of a strike by the union. After the seizure, the State procured an injunction against the strike in a State court, and the strike terminated a day later. A month after that, a new collective bargaining agreement was signed, and two months later, the governor ended the seizure. During the course of the litigation, the injunction had expired by its own terms. The court held the case moot, stating that a judgment at that late date would be wholly ineffectual for want of a subject matter on which to operate, and an affirmance would ostensibly require something to be done which had already taken place, while a reversal would ostensibly avoid an event which had already passed beyond recall.

The *Oil Workers'* opinion did not discuss *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498 (1911), stating that the application of that case to a similar fact situation had been rejected in *Harris* v. *Battle*, 348 U.S. 803 (1954). *Oil Workers* differs from our case in that there a new collective bargaining agreement was signed which had removed the cause for the strike. Here, the same collective bargaining agreement is present. In *Oil Workers*, the court said that adjudicating the merits would be an adjudication of a cause which no longer exists. In our case, as we show, the controversy is very much alive.

Oil Workers, however, was followed by *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963), which involved the validity of the same Missouri statute at issue in *Oil Workers*. In *Bus Employees*, the governor had seized a bus company under the same statute utilized in *Oil Workers*. After the filing of the jurisdictional statement in the Supreme Court, the governor, however, terminated the seizure order, leaving the labor dispute unresolved. The Court held the case was not moot and distinguished *Oil Workers* because in *Oil Workers* the underlying dispute had been settled and a new collective bargaining agreement had been executed. The Court added that there existed in *Bus Employees* not merely the speculative possibility of the invocation of the statute in some future labor dispute, but the presence of an existing unresolved dispute which continued subject to all the provisions of the statute involved. The report does not indicate whether or not the strike which had previously been enjoined by a State court in Missouri started up again after the executive order of the governor dissolving the seizure order.

In arriving at our conclusion, we have kept in mind the anti-injunction policy of the Norris LaGuardia Act and that we should avoid the at-largeness which brought it on. See *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195, 215, 219 (1962) (Mr. Justice Brennan dissenting). We have also been mindful of the often repeated admonition that we should not lend ourselves to becoming potential participants in a wide range of arbitrable disputes under existing and future collective bargaining agreements for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator. See *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976). As stated in *Buffalo Forge*, p. 409, there is no general federal anti-strike policy, and the Supreme Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris LaGuardia Act, which of course is subject to *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970).

The mootness doctrine is nothing new, and years ago, in *Southern Pacific Terminal*, the Court held a controversy not moot which was capable of repetition, yet evading review. In that case, the Interstate Commerce Commission had issued an order to cease granting one Young an undue rate preference for a period of not less than two years. The period as extended had expired prior to the hearing of the case by the Supreme Court. The Court recited the mootness rule as that when "pending an appeal something occurs without any fault of the defendant which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed." p. 514. It stated that in such cases the acts sought to be enjoined had been completely executed and there was nothing that the judgment of the court could have effected. A part of the reasoning was that the ICC usually operated by continuing orders and that it ought not to be able to defeat, by short term orders issued from time to time, the judicial construction of its orders which affected both the government and a carrier. The Court also mentioned the rights of the public which the government had endeavored to procure by the judgment of a court. Following *Southern Pacific Terminal*, numerous cases have considered the "capable of repetition, yet evading review," rule. The ones which immediately concern us are *Sosna* v. *Iowa*, 419 U.S. 393 (1975), and *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). *Sosna* did not involve a labor union, rather holding not moot a claim contesting the validity of an Iowa divorce residency statute where a class of plaintiffs had been certified although the named plaintiff had completed her residency and, indeed, been divorced elsewhere. The significance of *Sosna* to this opinion is that it is construed in *Weinstein* v. *Bradford*

(a prisoner's rights case) in the context of application of the capable of repetition, yet evading review doctrine. The doctrine is there construed as limited to a situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The second part of that standard is not substantially different from the one applied by us only shortly before in *Linkenhoker* v. *Weinberger*, 529 F2d 51, 52-53 (4th Cir. 1975).

The complaint in case No. 76-1785 (Local 1766) charges that the unions have for a long time past followed a pattern and practice of refusing to submit arbitrable disputes or differences to peaceful settlement through the grievance and arbitration procedures provided by said contracts and have repeatedly engaged in strike and work stoppages with an object to forcing and requiring Cedar and other signatory operators to settle such disputes and differences in accordance with the demands of the unions and in violation of said contracts. It also charges that since the effective date of the collective bargaining agreement the unions had repeatedly threatened and engaged in strikes and work stoppages with an object to forcing and requiring Cedar and other signatory operators to settle differences and disputes which are required to be settled under the terms of the collective bargaining agreement by the grievance and arbitration procedure in accordance with the demands of the unions. The complaint also charges that there is, and has been for many years, a pattern and practice of the unions to treat and consider arbitrable disputes and differences arising at any and all mines of signatory operators covered by the collective bargaining agree-

ment as their own, and to adopt as their own and as matters directly involving their own self-interest any and all disputes and differences arising at any mine of any operator signatory to said collective bargaining agreement, to engage in strikes and work stoppages in connection therewith in derogation of the collective bargaining agreement grievance procedures in order to coerce the operators into interpreting, applying, and administering the terms and provisions of the collective bargaining agreement favorably to the unions. The complaint further charged that the unions engaged in a strike over and in protest of the arbitrator's rulings with respect to the job posting dispute and consequent discharges which we remember took place in the mines served by Local 1759, the sister union of Local 1766.

The complaint alleges irreparable injury and damages and prays for injunctive relief to halt the strike, to require the present dispute to be submitted to arbitration, to require future arbitrable disputes to be submitted to arbitration, and for damages.

The complaint in case No. 76-1793 (Local 1759) alleges that the unions had for a long time past followed a practice of refusing to submit local or district disputes or differences at plaintiff's mines or related facilities to peaceful settlement through the grievance and arbitration procedures provided by the collective bargaining agreement but had repeatedly engaged in strikes and work stoppages with an object to forcing and requiring plaintiff to settle such disputes and differences in accordance with the demands of the unions. It is alleged they continue such pattern and practice. The complaint then alleges the disputes over the outside communications job and the discharge of the two employees, with the

resulting arbitrator's awards and the resulting strike over the awards.

The complaint alleges that Cedar has been and now is ready, willing, and able to submit to arbitration any and all matters giving rise to the dispute and work stoppage. It alleges irreparable injury and prays for injunctive relief to halt the strike, to submit the present disputes to arbitration, to submit future arbitrable disputes to arbitration, and for damages.

In case No. 76-1846 (the Southern Ohio and Local 1949 case), the verified complaint was in two counts. The first count alleged a work stoppage as a result of the refusal to cross the picket line previously described, the members of which picket line being later found by the district court to be members of the UMWA but not of Local 1949. It alleged that Southern Ohio was ready, willing, and able to arbitrate the dispute of whether or not the Local 1949 members had to cross the picket line, irreparable injury, and damages.

The second count repeated the allegations of the first count and added that there was a likelihood that the unions might repeatedly and willfully engage in work stoppages in specific disregard of the collective bargaining agreement's provisions in that under the existing 1974 agreement there had been a total of 15 work stoppages or strikes previous to the existing strike, which had resulted in the loss of in excess of 5,000 man days of work. The complaint alleged a willful and deliberate pattern of refusing and avoiding compliance with the arbitration procedures of the collective bargaining agreement, and resorting instead to the economic pressure of strike and work stoppages for the purpose of coercing accession to demands of the unions which were

subject to the arbitration procedures of the collective bargaining agreement. It alleged that Southern Ohio was and had been ready, willing, and able to arbitrate the disputes but that the unions had refused so to do. The complaint charged that the continuing resort to strikes rather than to arbitration would likely continue into the future.

The complaint, as to the first count, prayed for injunctive relief to stop the strike, to submit the dispute to arbitration, and to take such further action as might be necessary to comply with the collective bargaining agreement. As to the second count, the complaint prayed for injunctive relief to stop the strike, to submit present and future arbitrable disputes to arbitration, and to take action necessary to assure compliance with the terms of the collective bargaining agreement. Damages were asked for under the first count.

In ascertaining whether these cases are moot, because the complaint was dismissed in No. 76-1785 (local 1766), the allegations of the complaint must be taken as true. *Kossick* v. *United Fruit Growers*, 365 U.S. 731, 732 (1961). We think the same principle must apply in case No. 76-1793 (Local 1759), where the district court, by its indefinite continuance, denied injunctive relief without a hearing which deprived Cedar of any chance to present facts other than those alleged in the complaint as surely as if the case had been dismissed. A similar principle, albeit somewhat different, should apply in case No. 76-1846 (Local 1949). In the case concerning Local 1949, a hearing was held, so we should consider both the allegations of the verified complaint and the facts shown at the hearing should they be different from the complaint in any essential element, which they are not.

It is, of course, admitted by all that the strike ended during the pendency of this appeal and only a short while after the argument of the cases. It is therefore apparent that the first element of the test in *Weinstein* was met, that is to say, the challenged actions in each case were in their duration too short to be fully litigated prior to their cessation or expiration. The challenged action of each of the unions is its strike which ended prior to the time it was fully litigated.

In case No. 76-1785 (Local 1766), Cedar has alleged that the unions have followed a pattern and practice of refusing to submit arbitrable disputes or differences to peaceful settlement through the grievance and arbitration procedures provided by the collective bargaining agreement, and that they have repeatedly engaged in strikes and work stoppages with an object to forcing and requiring Cedar to settle such disputes in accordance with the demands of the unions rather than through arbitration as required by the collective bargaining agreement. Cedar also charges a pattern and practice of treating and considering arbitrable disputes and differences arising at other mines of signatory operators covered by the collective bargaining agreement as their own and adopting the same as matters involving their own self interest, and to that end engaging in strikes and work stoppages in connection with such disputes in violation of the collective bargaining agreement grievance procedures.

In case No. 76-1793 (Local 1759), Cedar has alleged that the unions had for a long time past followed a practice of refusing to submit local disputes and differences to settlement through the grievance and arbitration procedures provided by the collective bargaining agreement and that they had repeatedly engaged in strikes

and work stoppages with an object to forcing and requiring Cedar to settle such disputes and differences in accordance with the demands of the unions rather than through the grievance procedures provided by the collective bargaining agreement. Cedar alleges they continue such pattern and practice and that the strike under consideration is an example.

In case No. 76-1846 (Local 1949), Southern Ohio alleges a willful and deliberate pattern of refusing and avoiding compliance with the arbitration and grievance procedures and instead a resort to the economic pressure of strikes and work stoppages for the purpose of coercing accession by Southern to demands of the unions instead of subjecting the disputes to the arbitration procedures of the collective bargaining agreement. It alleges that the unions not only have failed and refused to subject the present dispute, which it says is arbitrable, to the grievance procedure of the collective bargaining agreement, but that the unions have, under the present agreement, engaged in 15 strikes over arbitrable issues instead of arbitrating them, and it alleges this pattern is likely to continue.

Cedar invites us to consider its affidavits filed with its applications for injunctions pending appeal in the ascertainment of whether or not these cases are moot. We think they may be considered in ascertaining whether the cases are moot, although they should not be considered in ascertaining the merits. This is so because there was no mootness question before the district court, so we are not reviewing that. Rather, we are deciding whether the cases are now moot, and just as the end of the strike during the pendency of the appeal is a fact which we should consider in deciding the mootness question, we should also consider other undisputed

relevant facts. As we have stated, mootness as we consider it here arises when "something occurs" "pending an appeal." *Southern Pacific Terminal*, p. 514. One affidavit filed by Cedar with respect to Locals 1759 and 1766 shows that there have been 15 strikes by Cedar employees and local unions under the 1974 agreement over arbitrable issues; that 7 of those strikes were engaged in by employees at mines other than the mine at which the dispute causing the strike arose, as well as by the employees at the mine where the dispute arose. The other affidavit shows there have been 26 strikes by Cedar employees and local unions under the 1974 agreement, 12 of which were engaged in by employees at more than one of the company's mines, and all of the 12 strikes were engaged in by employees in both Locals 1759 and 1766. While these affidavits may seem, on their face, to possibly be somewhat inconsistent, they are not necessarily so, which further points out the difficulty caused by the district courts' failures to grant hearings in either of these proceedings. These facts in all events are essentially undisputed by the unions as they may relate to our examination of the mootness question.

We think the allegations of a pattern and practice of strikes over arbitrable issues instead of resorting to the grievance procedures of the contract, coupled with the allegations in these three cases, of repeated specific instances of striking over such issues rather than arbitrating, are facts sufficient to show that there was a reasonable expectation that the same complaining parties (Cedar and Southern Ohio) would be subjected to the same action again, and thus that the second condition of the doctrine as set out in *Weinstein* has been complied with.

In this context, we note that in at least two cases the

Supreme Court has noted, in cases involving labor relations and strikes, that a factor to be considered is that ". . . authorizing the issuance of a temporary injunction as is frequently true of a temporary injunction in labor disputes, may effectively dispose of . . . [litigants] rights and render entirely illusory his right to review . . . [in the Supreme Court] as well as his right to a hearing before the Labor Board." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 308 (1964). That principle was alluded to in *Liner* in holding a case not moot in an appeal by a union. The same principle was relied on in *Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 115 (1974), and especially as that case was construed in *Weinstein*, p. 148. The principle quoted from *Super Tire* in *Weinstein*, at p. 148, is that " 'the great majority of economic strikes do not last long enough for a complete judicial review of the controversies they encounter,' " see *Super Tire*, 125-126.

The unions next argue that even if the issue is one properly framed as capable of repetition, yet evading review, that the cases only allow this view of mootness when a governmental interest is involved. See *Super Tire*, p. 122. We think this position is a too narrow view of the mootness doctrine. As a matter of principle, we doubt that a court is any less obliged to do justice between man and man than between citizen and sovereign. It is true that in the cases involving governmental entities, there will ordinarily be a policy, statute, or regulation which, unless not revoked or repealed, will continue to exist and which may indeed make more likely a repetition of the event which brought on the controversy in question. *Super Tire* phrases it as a brooding presence. But the Supreme Court, in *Carpenters Union* v. *Labor Board*, 357 U.S. 93 (1958), in note 2, has applied the

rule of *United States* v. *W. T. Grant*, 345 U.S. 629 (1953), to a dispute between companies and unions before the Labor Board over the hot cargo provisions of union contracts. The "sole question" in that case was whether the hot cargo provisions of the collective bargaining agreements involved amounted to an unfair labor practice in violation of 29 USC § 158(b) (4) (A). The *W. T. Grant* holding applied in the *Carpenters Union* case was that the case was not moot since the court could not say there was no danger of recurrent violation. No analysis of mootness in a case involving a labor dispute would be complete without the consideration of *Buffalo Forge* at note 8. In that case, the sympathy strike of a production and maintenance union took the form of those employees refusing to cross a picket line established by office and technical workers. Although the dispute between the office and technical workers and the company continued, the production and maintenance employees' sympathy strike had ended prior to the hearing of the case, but the strike might have been "resumed at any time in the near future at the direction of the international union or otherwise." 45 L.W. at 5348. The court held the case was not moot despite the return of the production and maintenance employees to the job, relying on *Super Tire* and *Bus Employees*. It stated that "[t]he presence of an existing dispute makes this a live controversy. . . ." 45 L.W. at 5348, note 8.

The importance of the holdings in *Buffalo Forge* and *Carpenters Union* are that in each of them the court applied, to disputes between companies and unions, the same mootness rules applicable in the cases in which there appeared a public interest such as the enforcement of a statute. And in both of those cases, which were suits between private parties over the construction of

collective bargaining agreements and involving strikes which had ended during the pendency of the actions, the Court relied upon cases which had been decided in the context of the presence of a public order, statute, regulation, etc. This leads us to believe that the rules for ascertaining mootness in public interest and private cases should be essentially the same. While it is true that courts may take a longer look at cases involving a public policy, statute, or regulation because of the continuing presence of such, we do not think it is true that different rules are applied. Indeed, since mootness is a jurisdictional principle, no sense of urgency brought about by the application of a public law, etc., should be able to confer jurisdiction on a court where it has ceased.

In this respect, we also note that the collective bargaining agreement here in question affects a substantial part of the entire bituminous coal industry in the United States. All signatory operators throughout the country are considered a single bargaining unit. See *United Mine Workers*, 179 NLRB 479 (1969). The Bureau of Mines weekly coal report of March 18, 1977, for example, shows that West Virginia produces more than 15% of the nation's bituminous coal, 2,086,000 tons in that week. The plan on file in this court for the disposition of criminal cases from the Southern District of West Virginia shows that in fiscal 1975 there were about 300 *Boys Market* injunction cases in the Southern District of West Virginia alone involving wildcat strikes. So, if the public interest is a *sine qua non* in determining whether or not the capable of repetition, yet evading review doctrine is to be applied, and we doubt that it is, we think the public has an interest in having decided the questions which have arisen again and again between

the parties here and which in the strike involved in these cases directly affected almost the entire bituminous coal industry of the nation.

Accordingly, we hold that the questions are not moot. Accord, *Atlantic Richfield Co.* v. *Oil and Chemical Workers Int. Union*, 447 F2d 945 (7th Cir. 1971).

VIII

A.

In each of the cases before us, there is no argument but that, aside from the question of the construction of *Buffalo Forge*, the necessary prerequisites for the issuance of *Boys Markets'* injunctions have been met as set out in that opinion at page 254, and no discussion of those various factors is either necessary or appropriate here.

B.

Our principal problem is to construe *Buffalo Forge* and apply it to the facts of these cases.

Certiorari was granted in *Buffalo Forge* because the Courts of Appeals were divided in their construction of *Boys Markets*, and the Court set *Buffalo Forge* in the context of a statement by the Court of Appeals that the strike in that case was not " 'over a grievance which the union has agreed to arbitrate' ". 428 U.S. at 404 (1976); 417 F2d at 1210 (2d Cir. 1975). In *Buffalo Forge*, two office and technical workers' locals of the United Steelworkers had been certified to represent the office and technical employees but were unable to consummate their first collective bargaining agreements with the company. They struck and established picket lines, as they had a right to do, in the prosecution of their demands. The office and technical workers' strike and

pickets were, of course, a part of a classically legitimate strike. Two other locals of the United Steelworkers, representing the production and maintenance employees of the company, refused to cross the office and technical workers' picket lines. The production and maintenance workers had no separate quarrel with the company, but maintained they had a right to refuse to cross the picket lines despite a no-strike clause in their contracts with the company. The only dispute the company had with the production and maintenance locals was whether or not they had a right to refuse to cross the office and technical locals' picket lines. The contracts of the production and maintenance locals also contained broad arbitration clauses. While the Court held, p. 410, that the issue of whether or not the production and maintenance locals' refusal to cross the office and technical picket lines was arbitrable under the contract: "[c]oncededly, that issue was arbitrable," the Court went on to hold that an injunction should not issue pending arbitration and stated that ". . . it does not follow that the district court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator. . . ."

The Court reasoned that "[n]either its [the strike of the production and maintenance locals] causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and . . . [the production and maintenance locals], p. 407, 408.

We think the Court meant to tie together the non-arbitrability of the underlying cause with the cause of the strike at issue so that, when the underlying cause is not subject to arbitration, a refusal to cross a picket line, generated by a strike over the underlying cause,

is not a violation of a no-strike clause which is enforceable by injunction against the strike[1a] although it may be by arbitration. In our opinion, the Court meant thus to restrict the holding of *Boys Markets,* which many cases had taken to be that if an issue were arbitrable, assuming other conditions were met, an injunction might issue to prevent a strike pending arbitration of the arbitrable issue. Following *Buffalo Forge,* it seems that where the underlying issue is not arbitrable, then a refusal to cross a picket line set up on account of that underlying issue, although the refusal may be arbitrable, may not be prevented by injunction pending arbitration.

Our analysis is supported by note 9 in *Buffalo Forge* as it deals with the cases of the various circuits which are overruled at least by strong implication. In *NAPA Pittsburgh,*[2] Altoona Local 110, in a dispute over recognition, picketed the Pittsburgh location where Local 926 was the bargaining agent. The underlying dispute between Local 110 and NAPA Pittsburgh, representation, of course was not arbitrable, especially as between Local 926 and the company. In *Island Creek,*[3] a dispute arose between Local 680 and Florence Mining Company. Local 680 picketed Island Creek, which had as its local 988, both of the UMW. The nature of the dispute between Local 680 and Florence is not divulged in the opinion, but it is obvious that Island Creek could not have arbitrated an issue between Florence and Local 680. In *Armco,*[4] the pickets were to protest federal and State allocation of gasoline, a matter obviously not sub-

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[1a] Pending arbitration of course.

[2] *NAPA Pittsburg, Inc. v. Automotive Chauffeurs,* 502 F2d 321 (3rd Cir. 1974), cert. den. 419 U.S. 1049 (1974).

[3] *Island Creek Coal Co. v. Mine Workers,* 507 F2d 650 (3rd Cir. 1975), cert. den. 423 U.S. 877 (1975).

[4] *Armco Steel Corp. v. Mine Workers,* 505 F2d 1129 (4th Cir. 1974), cert. den. 423 U.S. 877 (1975).

ject to arbitration in any context. In *Pilot Freight Carriers,*[5] Local 512, from Jacksonville, Florida, was in dispute with Pilot over recognition. On account of that dispute, the employer was picketed at its Kernersville, North Carolina installation, which had as its local 391, both Teamsters Locals. The underlying recognition dispute, of course, was not arbitrable in any context. In *Wilmington Shipping Company,*[6] employees of the Port Authority struck and picketed the Port of Wilmington. Local 1426 of Wilmington Shipping Company refused to cross the picket line, as it had a right to do if the picket line were bonafide. The dispute was over whether or not the picket line was bonafide, and the parties agreed that this was an arbitrable matter under the contract. It is seen, though, that Wilmington Shipping Company could not have agreed to arbitrate with Local 1426 the underlying dispute between the Port Authority and its employees. In *Monongahela,*[7] Local 2357 was in a dispute with the employer at Clarksburg over recognition and as a result picketed the employer at Panhandle, which had as its local 2332, both IBEW. It is seen that Local 2332 and the employer could not have arbitrated a dispute over recognition between Local 2357 and the same employer. In *Valmac,*[8] Local 425 had separate contracts with the employer at four towns in Arkansas. As a result of contract expirations at two of the towns and the resulting dispute, the employer's operations at the other two towns were picketed. The renewals of the contracts, of course, were not subject to arbitration.

[5]*Pilot Freight Carriers, Inc. v. Teamsters,* 497 F2d 311 (4th Cir. 1974), cert. den. 419 U.S. 869 (1974).

[6]*Wilmington Shipping Co. v. Longshoremen,* 86 LRRM 2846 (4th Cir. 1974), cert. den. 419 U.S. 1022 (1974).

[7]*Monongahela Power Co. v. Electrical Workers,* 484 U.S. 1209 (4th Cir. 1973).

[8]*Valmac Industries v. Food Handlers,* 519 F2d 263 (8th Cir. 1975), vacated 428 U.S. 906 (1976).

In *Associated General Contractors,*[9] Local 110, IBEW, picketed a job site on which the electrical subcontractor was paying lower wages than Local 110 contracts would have provided for had it been on the job instead of Local 84 of the Christian Laborers Association, which had the electrical subcontracting labor. In a suit brought by the general contractor and the mechanical subcontractor against their locals which refused to cross 110's picket lines, it is seen that the underlying dispute, that of the lower wages paid to members of Local 84, was not subject to arbitration between the general and mechanical contractors and their locals.

The theme of all of these cases just named, and overruled at least by implication by the Supreme Court in note 9, is that either the underlying dispute was not subject to arbitration at all or at least it was not subject to arbitration by the defendant union and the company. Put another way, the central question to these cases seems to be: Is the object of the strike at hand to compel the company to concede an arbitrable issue?

Our conclusion as to the central question in cases such as the ones we have before us is further strengthened by the decisions listed in note 9 of *Buffalo Forge* as having been correctly decided.

In *Amstar,*[10] the company's installation at Arabi, Louisiana (Meat Cutters Local No. P-1101) was picketed by ILA pickets presumably in furtherance of an economic dispute with Amstar, whose contracts with longshoremen's locals had expired at Brooklyn, Philadelphia, and Boston. The underlying dispute, an economic one over contract expiration, was not arbitrable, of course.

[9]*Associated General Contractors v. Operating Engineers,* 519 F2d 269 (8th Cir. 1975).

[10]*Amstar Corp. v. Meat Cutters,* 468 F2d 1372 (5th Cir. 1972).

In *Plain Dealer*,[11] the Newspaper Guild was engaged in a lawful economic strike and picketed the paper. The craft unions representing some of the other employees would not cross the picket lines. While neither the district court's opinion nor the per curiam affirmance of the denial of injunctive relief discloses the cause of the underlying strike of the Newspaper Guild, it seems to us doubtful that a lawful economic strike would be arbitrable at all. Thus, Amstar could not concede an arbitrable issue because there was none, and neither could the *Plain Dealer*.

Since the Supreme Court, at p. 407 of *Buffalo Forge*, has stated, in effect, that *Boys Markets* is not overruled, "*Boys Markets* plainly does not control this case," we take it that a correct construction of *Buffalo Forge* is to limit the application of *Boys Markets* so that it does not apply in cases where the only dispute between the company and the union is over the meaning or application of the no-strike provision, express or implied, which dispute has been brought about by a dispute which is not arbitrable. The production and maintenance locals' refusal to cross the picket lines in *Buffalo Forge* was plainly brought about by the dispute between the company and the office and technical locals, which underlying dispute[12] was not arbitrable. So, although the production and maintenance strike obviously was in an effort to compel the company to concede an issue to the office and technical locals, it was not to compel the company to concede an *arbitrable* issue.

We next apply these principles to the controversies between the unions and their respective companies here.

[11] *Plain Dealer Pub. Co. v. Cleveland Typographical Union*, 520 F2d 1220 (6th Cir. 1975).

[12] See *Kentucky West Va. Gas Co. v. Oil, Chemical and Atomic Workers*, No. 76-1852 (6th Cir. 1977).

C.

Case No. 76-1793 involving Local 1759 and Cedar Coal Company.

The best light that can be put on the strike by Local 1759 is that it commenced over the arbitrator's award in the dispute concerning the communications job and was accentuated by the discharge of the two employees for taking part in that strike. Not only were both of these disputes plainly subject to arbitration, they were in fact arbitrated. Indeed, the union filed a suit in the district court to enforce one of the awards.

Extended discussion of this as part of this case is not necessary because of a passage in *Buffalo Forge*, which is:

> "Contrary to the Court of Appeals, the employer claims that despite the Norris LaGuardia Act's ban on federal-state injunctions in labor disputes, the district court was empowered to enjoin the strike by § 301 of the Labor-Management Relations Act as construed by *Boys Markets* v. *Retail Clerks Union*, supra. This would undoubtedly have been the case had the strike been precipitated by a dispute between union and management that was subject to binding arbitration under the provisions of the contracts." p. 406.

The facts of Local 1759's strike fit squarely into this language, and it is clear that, on the facts alleged in the complaint, the refusal to hear the preliminary injunction was error.

We do not think valid the unions' defense that the nature of the strike changed. Their contention is that, following the district court's restraining order, additional causes to those just above set forth were that the company had filed a suit in the federal court to enforce the contract under *Boys Markets* and that the district court

had issued its TRO pursuant to the company's suit. Were we to hold valid a defense in such cases, that the union may strike over the actions a court has taken in its consideration of the matter, such would amount to nothing more nor less than an overruling of *Boys Markets* by the unilateral act of one of the parties and would abandon completely the function of the courts in these cases as set forth in *Boys Markets*. It would be just as tenable for a company which had been ordered to arbitrate by a court to refuse to do so as for a union to do the same thing.

D.

Case No. 76-1785, Local 1766 and Cedar Coal Company.

Local 1766 is the sister local of Local 1759, and it should be remembered that the dispute between Local 1759 and Cedar commenced this whole controversy. The facts in the complaint, which we must treat as true, allege that the strike of Local 1766 was over the arbitrator's rulings between 1759 and Cedar.

While the dispute may not technically have been "over a grievance which both parties are contractually bound to arbitrate," *Boys Markets*, p. 254, see *Buffalo Forge*, p. 404, because it is at least arguable that Cedar could not have conceded the arbitrable issue to Local 1766, it rather being engaged in arbitration with Local 1759, we think that construction of *Boys Markets* is too narrow here. Here, the employer is the same as to both Locals; the collective bargaining agreement is the same; the bargaining unit is the same; the locality of employment is the same; and, most importantly, the purpose of 1766's refusal to cross the 1759 picket lines was not to coerce Cedar into conceding an issue to Local 1759 which was not arbitrable; rather, the purpose of the 1766 strike

was to coerce Cedar into conceding an issue to Local 1759 which was admittedly arbitrable. We also bear in mind that under the two-tier arbitration provisions of the collective bargaining agreement, Article XXIII, the award in the 1759 case apparently would affect also Local 1766, for there are only three grounds of appeal to the Arbitration Review Board: that the decision of a panel is in conflict on the same issue with other panels; that the decision involves a new question of a substantial contractual issue; and that the panel decision is arbitrary, etc.

We think, then, that since the purpose of the strike of Local 1766 was to compel Cedar to concede an arbitrable issue to Local 1759, with the same employer, the same collective bargaining agreement, the same bargaining unit, and the cause of Local 1759 made its own, that the *Buffalo Forge* exception to *Boys Markets* should not apply, and assuming the arbitrability of the question of whether or not Local 1766 might be required to cross Local 1759's picket lines, it was error to dismiss the complaint.

E.

Case No. 76-1846, Local 1949 and Southern Ohio Coal Company.

The district court, in this case, found that the resulting work stoppage was "one of failure to cross a picket line maintained by other than the members of this particular local union."

The court did not find whether the purpose of the strike was merely to express sympathy for Local 1759's position or to require the concession of an arbitrable issue by either Cedar or Southern. But we do not think that a lack of more specific findings should justify recon-

sideration of that point. In this case, there was no dispute between Southern and Local 1949 which had anything to do with the picket line, or not crossing it, until after the picket line appeared. And, while the refusal to cross the picket line may have been an arbitrable dispute, it was the only dispute between Southern and Local 1949. Even considering that the underlying purpose of 1949's strike may have been to put indirect pressure on Cedar to concede an arbitrable issue to Local 1759, Southern could concede nothing to Local 1759 because it was not bound to it by a collective bargaining agreement, and there was no dispute between Southern and Local 1759.[13]

Accordingly, we think the district court correctly denied a preliminary injunction pending arbitration in that case.

IX

This leaves the procedure on remand.

Our opinion is a rather narrow one, going only to the denial of injunctive relief pending arbitration in all three cases and in only one, No. 76-1785 (Local 1766) going to the outright dismissal of the complaint.

We think the issue of whether Local 1766 might be required to cross Local 1759's picket line was an arbitrable issue, and we think the same should be said of the refusal of Local 1949 to cross the picket line made up of UMW members, not necessarily from Local 1759. On remand, the district courts involved should direct those issues to be arbitrated forthwith, and when such arbitration has been completed, then consider those cases (No. 76-1785, Local 1766) (No. 76-1846, Local 1949) in the light of this opinion.

[13]The facts of this case are remarkably similar to *Island Creek*, supra, which the Supreme Court has indicated was decided wrongly in *Buffalo Forge*, note 9.

In these same cases involving Locals 1766 (No. 76-1785) and 1949 (No. 76-1846), the arbitration of the matter of whether those locals might be required to cross the picket lines established should be decided by the arbitrators prior to proceeding with the damages aspects of the cases. *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254 (1962); *Valmac Industries, Inc.* v. *Food Handlers*, 519 F2d 263, 269 (8th Cir. 1975), vacated on other grounds, 428 U.S. 906 (1976).

X

The employees involved in all of these cases are long since back at work and for that reason alone, no presently existing need being shown, in our discretion we deny the request for an injunction pending appeal in case No. 76-1785 (Local 1766).

For the same reasons, in our discretion we dissolve the injunction previously issued in case No. 76-1793 (Local 1759), it being obvious that the district courts may grant temporary injunctive relief if otherwise authorized after remand in any of the cases.

An injunction pending appeal is denied in case No. 76-1846 (Local 1949) for the reasons expressed in this opinion affirming the denial of injunctive relief by the district court.

XI

It should not be implied that, because injunctions may have been authorized against Locals 1759 and 1766, such are presently required. As to that point, we express no opinion, as we also do not as to the various claims made for permanent injunctive relief and damages.

XII

In case No. 76-1785 (Local 1766), the judgment of the district court is vacated and the case is remanded for action not inconsistent with this opinion.

In case No. 76-1793 (Local 1759), the case is remanded for action not inconsistent with this opinion.

In case No. 76-1846 (Local 1949), the judgment of the district court is affirmed and the case is remanded for action not inconsistent with this opinion.

Paragraph X of this opinion and a separate order this date entered will dispose of case No. 76-8239 (Misc.) concerning the injunction pending appeal in case No. 76-1793 (Local 1759).

APPENDIX B

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States have jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

APPENDIX C

Grievance and arbitration provisions of the National Bituminous Coal Wage Agreement of 1974.

ARTICLE XXIII—SETTLEMENT OF DISPUTES

Section (a) Mine Committee

A committee consisting of at least three (3) Employees shall be elected at each mine by the Employees at such mine. Each member of the mine committee shall be an Employee of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an Employee of said mine. The duties of the mine committee shall be confined to the adjustment of disputes arising out of this Agreement that the mine management and the Employee or Employees fail to adjust. The Mine Committee shall have no other authority or exercise any other control nor in any way interfere with the operation of the mine; for violation of this section any and all members of the committee may be removed from the committee.

A Mine Committee member shall not be suspended or discharged for his official actions as a mine committee member. An Employer seeking to remove a mine committee member shall so notify the affected mine committee member and the other members of the mine committee. If the Mine Committee objects to such removal, the matter shall be submitted directly to arbitration within 15 calendar days from such objection. If the other members of the mine committee so determine, the affected member shall remain on the mine committee until the case is submitted to and decided by an arbitrator. If the Employer requests removal of the entire Mine Committee, the matter automatically shall be submitted to arbitration within 15 calendar days after such request, and the Mine Committee will continue to serve until the case is submitted to and decided by an arbitrator.

Section (b) Arbitration Review Board

1. Within 60 days following the effective date of this Agreement, the United Mine Workers of America and the Bituminous Coal Operators' Association will establish an Arbitration Review Board composed of one representative of the UMWA, one representative of the Employer, and a chief umpire to be jointly selected by both parties. This 60-day period may be extended by mutual agreement.

2. The chief umpire jointly selected by the parties shall serve for the balance of this Agreement, unless removed by formal resolution adopted by either the International Executive Board of the United Mine Workers of America or the Board of Directors of the Bituminous Coal Operators' Association.

3. In the event of removal, resignation, death or incapacity of the chief umpire, the president of the UMWA and the president of the B.C.O.A. shall endeavor to select a mutually acceptable successor within 15 days. In the event the parties fail to agree, they shall request the aid of the Federal Mediation and Conciliation Service in selecting a mutually acceptable successor. The composition of the panel may be considered by the parties at the time when renewal agreements are being negotiated.

4. The presidents of the UMWA International Union and the B.C.O.A. shall jointly establish a panel of impartial arbitrators for each UMWA district. These panels may be changed, augmented or supplemented by mutual

consent of the appointing parties. Arbitrators may be removed from a panel by either party upon 10 days advance written notice.

Section (c) Grievance Procedure

Should differences arise between the Mine Workers and the Employer as to meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

Disputes arising under this Agreement shall be resolved as follows:

1. The Employee will make his complaint to his immediate foreman who shall have the authority to settle the matter. The foreman will notify the Employee of his decision within 24 hours following the day when the complaint is made.

2. If no agreement is reached between the Employee and his foreman, the complaint shall be taken up within seven (7) working days of the foreman's decision by the mine committee and mine management. Where the committee consists of more than three members, the Employer shall have the right to meet with a maximum of three (3) (to be chosen by the mine committee). The committee and management will complete the standard grievance form stating the Employee's grievance and the response of management.

3. If no agreement is reached by the committee and management within seven (7) working days after the complaint is taken up by them, the grievance shall be referred to a representative of the UMWA district, desig-

nated by the Union, and a representative of the Employer within seven (7) working days of the time the grievance is referred to them. The representative of the Union and the Employer shall review the facts and pertinent contract provisions in an effort to reach agreement. Unless both parties consent, no verbatim transcript of testimony shall be taken. Following the meeting, should they fail to settle the grievance, the representatives shall prepare a concise, joint statement. In the joint statement the Union and Employer will each set forth its views of the facts and its position on the contractual issues. The joint statement shall be signed by the representative of the UMWA district and the representative of the Employer. Neither the Union's representative nor the Employer's shall be persons who participated in steps one or two of this procedure.

4. In cases where the district representative and the representative of the Employer fail to reach agreement, the matter shall, within ten (10) calendar days after referral to them, be referred to the appropriate panel arbitrator who shall decide the case without delay. Cases shall be assigned to panel arbitrators in rotation. Unless testimony has been taken at step 3, at the earliest possible time, but no later than fifteen (15) days after referral to him, the arbitrator shall conduct a hearing in order to hear testimony, receive evidence and consider arguments. In cases where a transcript has been made at step 3, the arbitrator shall have the discretion to conduct a supplementary hearing at or near the mine site. In cases in which the parties have made no transcript at step 3, and the joint statement indicates that there is no question of fact involved in the grievance, the arbitrator may decide the case without a transcript and upon the basis of the joint statement of the parties, exhibits and briefs.

The arbitrator's decision shall be final except as provided in paragraph 5 herein, and shall govern only the dispute before him. Expenses and fees incident to the service of an arbitrator shall be paid equally by the Employer or Employers affected and by the UMWA district affected.

5. Either party to an arbitration, upon receiving a final award by a panel arbitrator, may petition the Arbitration Review Board to appeal the decision of the panel arbitrator. Such petition shall include a statement of the grounds for the appeal, which shall consist of one or more of the following:

(i) That the decision of the panel arbitrator is in conflict with one or more decisions on the same issue of contract interpretation by other panel arbitrators.

(ii) That the decision involves a question of contract interpretation which has not previously been decided by the Board, and which in the opinion of the Board involves the interpretation of a substantial contractual issue.

(iii) That the decision is arbitrary and capricious, or fraudulent, and therefore, must be set aside.

Upon receipt of such petition, the Arbitration Review Board shall review the decision of the panel arbitrator to determine whether grounds for appeal exist. If not, the Board will so inform the parties. If so, the Board shall review the decision of the panel arbitrator making whatever changes are necessary to assure that the final decision correctly resolves all contractual questions and issues presented, and is consistent with prior decisions of the Board. The Board's decision shall be made by majority vote and it shall issue its decision within fifteen

(15) days. Following review, the Board shall countersign its decision and transmit a copy to each party.

Section (d) Fifteen Day Limitation

Any grievance which is not filed by the aggrieved party within fifteen (15) calendar days of the time when the Employee reasonably should have known of it, shall be denied as untimely and not processed further.

Section (e) Earnest Effort to Resolve Disputes

An earnest effort shall be made to settle differences at the earliest practicable time. Where an Employee makes a complaint during work time, the foreman shall, if requested to do so, and if possible, consistent with continuous production, discuss the matter briefly on the spot.

Section (f) Employee's Right to Presence of Member of Mine Committee

Except where it will interfere with production, an Employee shall be entitled, at his request, to have a member of the Mine Committee present to assist him at any discussion with his foreman held pursuant to section (c)(2) of this Article.

Section (g) Right of Grievant to be Present

The grievant shall have the right to be present at each step of the grievance procedure until such time as all evidence is taken.

Section (h) Finality of Decision or Settlement

Settlements reached at any step of the grievance procedure shall be final and binding on both parties and shall not be subject to further proceedings under this Article except by mutual agreement. Settlements reached at

steps 2 and 3 shall be in writing and signed by appropriate representatives of the Union and the Employer.

Section (i) Exclusion of Legal Counsel

Neither party will be represented by an attorney licensed to practice law in any jurisdiction in any of the steps of the grievance procedure except by mutual agreement applicable only to a particular case.

Section (j) Expenses of Chief Umpire and Panel Umpires

The expenses of the chief umpire, and his necessary office and staff expenses will be shared equally by the BCOA and the UMWA.

Section (k) Circulation of Approved Decisions

Panel arbitrators shall be furnished promptly with copies of all decisions entered by the Board. The chief umpire through his staff shall prepare a looseleaf binder which shall contain summaries of the Board's decisions with respect to contractual issues arising under the Agreement. The binder shall be organized along the lines of the Agreement and shall be indexed by subject matter and case title. The binder shall be maintained by the chief umpire through his staff on a current basis and copies of any pages changed to reflect new decisions shall be provided to the parties on a monthly basis.

Section (l) Waiver of Time Limits

By agreement the parties may waive the time limits set forth in each step of the grievance procedure.

Section (m) Settlement of Differences or Disputes During the First Sixty Days of this Agreement

During the first sixty (60) days of this Agreement, or thereafter by a mutually agreed extension, the parties

hereto agree to resolve differences or disputes covered by this Article in accordance with the Settlement of Disputes provisions of Article XVII of the National Bituminous Coal Wage Agreement of 1971 which is adopted and incorporated herein by reference.

APPENDIX D

Cases pending in the United States District Court for the Southern and Northern Districts of West Virginia in which United Mine Workers of America labor organizations are being sued for damages on account of work stoppages caused by the appearance of stranger pickets.

Southern District

No.	Civil Docket No.	Plaintiff(s)
1	72-333 CH	U.S. Steel Corp.
2	72-1340 BL	U.S. Steel Corp.
3	72-1398 BL	U.S. Steel Corp.
4	72-1407	U.S. Steel Corp.
5	72-1451 BL	U.S. Steel Corp.
6	72-2985 HN	U.S. Steel Corp.
7	73-21 BL	U.S. Steel Corp.
8	73-22 BL	U.S. Steel Corp.
9	73-64 BL	U.S. Steel Corp.
10	73-355 CH	Westmoreland Coal Co.
11	74-11 BL	U.S. Steel Corp.
12	74-18 BL	U.S. Steel Corp.
13	74-19 BL	U.S. Steel Corp.
14	74-79 CH	Armco Steel Corp.
15	74-81 CH	U.S. Steel Corp.
16	74-95 CH	U.S. Steel Corp.
17	74-96 CH	Amigo Smokeless Coal Co., et al.
18	74-156 CH	U.S. Steel Corp.
19	74-245 CH	U.S. Steel Corp.
20	74-273 CH	Central Coal Co.
21	74-282 CH	Bethlehem Mines Corp.
22	74-289 CH	U.S. Steel Corp.
23	74-342 CH	Central Appalachian Coal Co., et al.
24	74-370 CH	Bethlehem Mines Corp.
25	74-449 CH	Southern Appalachian Coal Co.
26	74-469 CH	Youngstown Mines Corp.
27	74-523 CH	Armco Steel Corp.
28	74-524 CH	Southern Appalachian Coal Co.
29	74-525 CH	Bethlehem Mines Corp.

No.	Civil Docket No.	Plaintiff(s)
30	74-528 CH	Bethlehem Mines Corp.
31	74-529 CH	Island Creek Coal Co.
32	74-538 CH	U.S. Steel Corp.
33	74-545 CH	Youngstown Mines Corp.
34	74-546 CH	Cannelton Industries, Inc., et al.
35	74-547 CH	Ranger Fuel Corp.
36	74-550 CH	Allied Chemical Corp.
37	75-0283 CH	Armco Steel Corp.
38	75-0286 CH	Eagle Coal & Dock Co.
39	75-0311 CH	National Coal Mining Co.
40	75-0325 CH	Sycamore Mining Co.
41	75-0330 CH	Pond Creek Coal Co.
42	75-0494 CH	Carbon Fuel Co.
43	75-0499 CH	Brushy Fork Mining Co.
44	75-0533 CH	Youngstown Mines Corp.
45	75-0538 CH	Olga Coal Co.
46	75-0541 CH	U.S. Steel Corp.
47	75-0544 CH	Westmoreland Coal Co.
48	75-0546 CH	U.S. Steel Corp.
49	75-0562 CH	U.S. Steel Corp.
50	75-0563 CH	Armco Steel Corp.
51	75-0566 CH	Westmoreland Coal Co.
52	75-0572 CH	Bethlehem Mines Corp.
53	75-0585 CH	Westmoreland Coal Co.
54	76-0018 CH	Snapcreek Coal Co.
55	76-0019 CH	Elkay Mining Co.
56	76-0021 CH	Elkay Mining Co.
57	76-0050 CH	Brushy Fork Mining Co.
58	76-0314 CH	U.S. Steel Corp.
59	76-0317 CH	Armco Steel Corp.
60	76-0318 CH	Bethlehem Mines Corp.
61	76-0327 CH	Norma Coal Co., et al.
62	76-0333 CH	Cannelton Industries, Inc.
63	76-0476 CH	U.S. Steel Corp.
64	76-0111 CH	Youngstown Mines Corp.
65	76-0112 CH	Armco Steel Corp.
66	76-0117 CH	Bethlehem Mines Corp.
67	76-0120 CH	Omar Mining Co.
68	76-0121 CH	Cannelton Industries, Inc.

No.	Civil Docket No.	Plaintiff(s)
69	76-0122 CH	Cannelton Industries, Inc.
70	76-0140 CH	Southern Appalachian Coal Co.
71	76-0141 CH	Eastern Associated Coal Corp.
72	76-0142 CH	Eastern Associated Coal Corp.
73	76-0163 CH	Hawks Nest Mining Co.
74	77-2048 CH	Consolidation Coal Co.
75	74-297 CH	Island Creek Coal Co.
76	75-0108 CH	Island Creek Coal Co.
Northern District		
77	75-189-E	Bethlehem Mines Corp.
78	75-180-E	Bethlehem Mines Corp.
79	75-176-E	Southern Ohio Coal Co. and Ohio Power Co.
80	74-279-E	Island Creek Coal Co.
81	74-275-E	Consolidation Coal Co.
82	74-278-E	Badger Coal Co.
83	75-191-E	Consolidation Coal Co.
84	75-179-E	Consolidation Coal Co.
85	75-8 W	Windsor Power House Coal Co.
86	75-9 W	Consolidation Coal Co.
87	74-32 W	Windsor Power House Coal Co.
88	74-14 C	Windsor Power House Coal Co. and Bethlehem Mines Corp.